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Supreme Court of the United States
October Term 1997

MARC TIMMERMAN, Petitioner

versus

EDWARD McLAUGHLIN, JOAN THOMPSON,
FOREST BENEDICT, EPHRAIM GUTMARK,
ERNIE SANCHEZ, ANDRE GUERIN,
WILLIAM DAVIS AND WILLIAM JENKINS, Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

May the "reasonableness under all the circumstances" test for work-related searches by government employers of their employees' offices properly be applied to a search of a public university professor's office, conducted by police officers looking for a gun on suspicion that the professor planned to harm or kill his co-workers?

LIST OF ALL PARTIES

1. Marc Timmerman, plaintiff.
2. Edward McLaughlin, defendant.
3. Ephraim Gutmark, defendant.
4. Forest Benedict, defendant.
5. William Davis, defendant.
6. William Jenkins, defendant.
7. Ernie Sanchez, defendant.
8. Andre Guerin, defendant.
9. Joan Thompson, defendant.
10. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, defendant.

STATEMENT OF JURISDICTION

The judgment sought to be reviewed was entered on August 28, 1997. This Court has jurisdiction to review the judgment on a writ of certiorari pursuant to 28 U.S.C. 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Constitution of the United States, Amendment IV.

STATEMENT OF THE CASE

In spring of 1995, Dr. Marc Timmerman was hired as an assistant professor in the Mechanical Engineering Department of Louisiana State University ("LSU"). In the fall of 1995, unbeknownst to Dr. Timmerman, a man named Carl Fork had telephone conversations with LSU officials, including the chair of the Mechanical Engineering Department, the dean of the College of Engineering, and representatives of LSU's Human Resource Management department. Fork allegedly told LSU representatives that he thought Dr. Timmerman was planning to kill himself and perhaps other LSU employees.

In October 1995, LSU's Director of Human Resource Management placed Dr. Timmerman on administrative leave and required him to undergo psychological evaluation; he instructed Dr. Timmerman not to return to the Mechanical Engineering Department without permission from the department chair or the Director of Human Resource Management.

While Dr. Timmerman was out on administrative leave, and without his knowledge or consent, LSU campus police of-

ficers searched his office for a gun, on suspicion that Dr. Timmerman planned to kill himself or his co-workers. The chair of the Mechanical Engineering department used a key to unlock the door to Dr. Timmerman's office. The officers, who were accompanied by a representative of LSU's Human Resource Management department, searched Dr. Timmerman's desk, bookcase, files, boxes and "any other areas where a gun might have been hidden." They did not find a gun. The officers lacked a search warrant, and they have not alleged exigent circumstances or that they had probable cause.

Dr. Timmerman filed suit in federal district court on January 12, 1996, alleging deprivation of his Fourth and Fourteenth Amendment rights under color of state law. The basis for federal jurisdiction in the first instance is 28 U.S.C. 1331 and 28 U.S.C. 1343, as the action arises under 42 U.S.C. 1983 and is a civil action to redress the deprivation, under color of state law, of constitutional rights.

The district court entered summary judgment in defendants' favor, and the United States Court of Appeals for the Fifth Circuit affirmed.

REASON FOR ALLOWANCE OF WRIT

The United States Court of Appeals for the Fifth Circuit has decided an important question of federal law in a way that conflicts with relevant decisions of this Court. In particular, the Fifth Circuit misapplied the "reasonableness under all the circumstances" test for work-related searches set forth in *O'Connor v. Ortega*, 480 U.S. 79, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987) to the search of Dr. Timmerman's office by LSU police officers who were looking for a gun on suspicion that Dr. Timmerman planned to kill himself or his co-workers.

The "reasonableness under all the circumstances" test was intended to apply only to searches conducted by "supervi-

sors" and only to searches for "legitimate work-related reasons wholly unrelated to illegal conduct." *O'Connor v. Ortega*, 107 S.Ct. at 1500. It was not intended to sanction warrantless searches conducted by police officers operating on suspicion of criminal activity.

The proposition that Dr. Timmerman enjoyed a reasonable expectation of privacy in his office has not been challenged in the courts below. Nor has the search been found justified based on "exigent circumstances." Moreover, defendants have not argued that they had probable cause to conduct the search. Rather, the lower courts found the search was constitutional solely on the basis of the "reasonableness under all the circumstances" test.

The Court's holding in *O'Connor v. Ortega* was that

> public employer intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigation of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances.

107 S.Ct. at 1502.

The search at issue here was not for "noninvestigatory, work-related purposes." It was not a search to retrieve a file for work-related purposes, nor was it a routine inventory. Defendants admit they were looking for a gun.

Nor was this search for investigation of "work-related misconduct," defined by the Court as "inefficiency, incompetence, mismanagement, or other work-related misfeasance of its employees." 107 S.Ct. at 1501.

Moreover, this search was conducted primarily by LSU police officers, not by a "supervisor." The involvement of po-

lice officers in the search removes it from the *O'Connor v. Ortega* analysis. The Court there said:

> Individuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer. The operational realities of the workplace, however, may make *some* [emphasis in original] employees' expectations of privacy unreasonable when an intrusion is by a supervisor *rather than a law enforcement official*. [emphasis supplied].

107 S.Ct. at 1497. The Court's development of the "reasonableness" standard, rather than the warrant/probable cause standard, for workplace searches was driven by its appreciation of the differences between typical workplace searches by supervisors and searches conducted by police officers:

> While police, and even administrative enforcement personnel, conduct searches for the primary purpose of obtaining evidence for use in criminal or other enforcement proceedings, employers most frequently need to enter the offices and desks of their employees for legitimate work-related reasons wholly unrelated to illegal conduct. . . .
>
> Imposing unwieldy warrant procedures in such cases upon supervisors, who would otherwise have no reason to be familiar with such procedures, is simply unreasonable. In contrast to other circumstances in which we have required warrants, supervisors in offices such as at the Hospital are hardly in the business of investigating the violation of criminal laws.

107 S.Ct. at 1499-1500. Because this search was conducted by

police officers, there is no reason to dispense with the warrant requirement. The *O'Connor v. Ortega* Court intended police officers to be held to a higher standard than workplace supervisors:

> [W]hile law enforcement officials are expected to "schoo[l] themselves in the niceties of probable cause," no such expectation is generally applicable to public employers, at least when the search is not used to gather evidence of a criminal offense. It is simply unrealistic to expect supervisors in most government agencies to learn the subtleties of the probable cause standard. As Justice BLACKMUN observed in *T.L.O.*, "[a] teacher has neither the training nor the day-to-day experience in the complexities of probable cause that a law enforcement officer possesses, and is ill-equipped to make a quick judgment about the existence of probable cause."

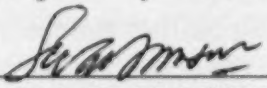
107 S.Ct. at 1501. *O'Connor v. Ortega* does not excuse the defendants' failure to obtain a warrant and establish probable cause, as law enforcement officials conducted the search based on a (mistaken) belief that Dr. Timmerman planned to kill himself or his co-workers.

The Fifth Circuit's decision to apply the "reasonableness under all the circumstances" test to the search of Dr. Timmerman's office conflicts with this Court's decision in *O'Connor v. Ortega*. A search for a gun, conducted by police officers, should not be judged by a standard reserved for searches by supervisors for work-related misconduct. If this rule is allowed to stand, then public employees everywhere are subject to warrantless searches of their private offices by police officers for evidence of criminal activity, without probable cause, so long as the search was "reasonable under all the circumstances." This Court did not intend such a result. Rather, this

Court intended that searches conducted by police officers, for evidence of criminal activity, must be based on probable cause. The "reasonableness under all the circumstances" test is reserved for searches conducted by supervisors, for "noninvestigatory, work-related purposes" or for "investigations of work-related misconduct" wholly unrelated to illegal or criminal activity.

For the foregoing reasons, Dr. Timmerman respectfully prays that this Court will grant a writ of certiorari.

Respectfully submitted,



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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-30300
Summary Calendar

MARC TIMMERMAN

Plaintiff-Appellant,

versus

EDWARD MCLAUGHLIN; JOAN THOMPSON; FOREST BENEDICT; EPHRAIM GUTMARK; ERNIE SANCHEZ; ANDRE GUERIN; WILLIAM DAVIS; WILLIAM JENKINS

Defendants-Appellees.

Appeal from the United States District Court
For the Middle District of Louisiana
(96-CV-34-B-M1)

Before KING, HIGGINBOTHAM, and DeMOSS, Circuit Judges.

PER CURIAM:*

*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Plaintiff Marc Timmerman appeals the district court's grant of summary judgment against him on his 42 U.S.C. § 1983 claim. Timmerman, an Assistant Professor of Mechanical Engineering at Louisiana State University (L.S.U.), alleges that the defendants, various officials at L.S.U., denied him his rights under the Fourth and Fourteenth Amendments by placing him on administrative leave, forcing him to undergo psychiatric evaluations, and conducting a search of his office, all based on a tip from an informant. The informant, Carl Fork, alerted L.S.U. to the possibility that Timmerman might attempt to harm himself or his co-workers with a firearm. Acting on Fork's tip, L.S.U. officials, including two officers from the campus police department, searched Timmerman's office for a firearm but found none. Timmerman then brought this suit.

I.

Timmerman's first claim on appeal is that the district court erred in relying on hearsay statements contained in the affidavits submitted by the defendants in support of their motion for summary judgment. In these affidavits, defendants Benedict, Gutmark, and McLaughlin relate the tips made to them by Fork which caused them to investigate Timmerman. Although a litigant may not employ inadmissible hearsay statements to support or oppose a motion for summary judgment, *see Buchanan v. Stanships, Inc.*, 744 F.2d 1070, 1076 (5th Cir. 1984), the statements to which Timmerman objects are not hearsay. Defendants do not rely on Fork's tips, "to prove the truth of the matter asserted;" i.e., that Timmerman was in fact a threat to his co-workers or himself. *See Fed. R. Evid* 801. Rather, defendants point to these statements to demonstrate their state of mind in an attempt to establish the reasonableness of their subsequent investigation of Timmerman. Whether Fork's warnings about Timmerman were correct or

not is immaterial, so long as the defendants acted reasonably in relying upon those warnings, *Cf. Akin v. Q-L Invs., Inc.*, 959 F.2d 521, 530 (5th Cir. 1992) (permitting the use of affidavits to demonstrate reliance on alleged misrepresentations, not the truth of the misrepresented facts). Timmerman argues, however, that the district court's focus on the credibility of Fork necessarily implies that the truth of Fork's statements is at issue. We do not agree. The district court's discussion of Fork's credibility bears on the reasonableness of the defendants' reliance on his tips, but it does not implicate the truth of the matters asserted in those tips.

II.

Timmerman further claims that the district court applied an improper standard in assessing the legality of the defendants' search of his office. The district court considered the search under the "reasonableness under all circumstances" test for work-related searches by government employers of their employees' offices, announced by the Supreme Court in *O'Connor v. Ortega*, 480 U.S. 709, 107 S. Ct. 1492, 94 L. Ed. 2d 714 (1987) (plurality op.). Timmerman contends, however, that because this search was for a firearm, a possible tool of criminal activity, and because campus police officers assisted in the search, the proper standard should instead be "probable cause."

Although the search of Timmerman's office was for a weapon, the purpose of the search was to uncover evidence of work misconduct and potential disruptive workplace behavior. As the protection of individuals from an employee known to be dangerous is a duty imposed on all employers by Louisiana law, *see Griffin v. Wolf's, Inc.*, 61 So. 2d 523 (La. Ct. App. 1952), the defendants had a valid work-related justification for their search. The more stringent probable cause standard is not appropriate for this search, as nothing in the record

indicates that the search was conducted for the purposes of "obtaining evidence for use in criminal or other enforcement proceedings," *see O'Connor*, 480 U.S. at 721, 107 S. Ct. at 1499-1500. Moreover, the fact that the object of the search, a firearm, was a potential implement of crime does not alter the work-related nature of the search. We have previously upheld a search for evidence of workplace misconduct under the *O'Connor* "reasonableness under all circumstances" test, despite the fact that the object of the search would have implicated an employee in criminal activity. *See United States v. Johnson*, 16 F.3d 69, 73-74 (5th Cir. 1994).

Timmerman, however, contends that the presence of campus police officers at this search transformed it from a workplace investigation into a criminal inquiry. We disagree. In *Johnson*, we upheld the challenged workplace search in part because it was not requested by a law enforcement agency, but was instead initiated by the employer for work-related reasons. *See id.* at 74. Here, the record indicates that the campus police officers undertook the search only upon the request of L.S.U. administrators. The record does not demonstrate why L.S.U. administrators felt it necessary to ask the campus police officers to participate in the search, but there is no evidence that the defendants suspected Timmerman of having committed a crime or that they intended to pursue criminal charges against him. Rather, the defendants acted after learning that Timmerman might pose a danger to the safety of his department, which would have constituted "workplace misconduct." Furthermore, in *O'Connor*, the Supreme Court rejected a probable cause standard for work-related searches of employees' offices, despite the fact that a "Hospital security officer" had participated in the challenged search in that case. *See O'Connor*, 480 U.S. at 713, 107 S. Ct. at 1495.

III.

Finally, Timmerman asserts on appeal that the district court erred in refusing to consider deposition testimony of one of the defendants, Forest Benedict, offered by Timmerman in support of his opposition to the defendants' motion for summary judgment. Acting pursuant to well-settled Fifth Circuit precedent, *see Wicks v. Mississippi State Employment Servs.*, 41 F.3d 991, 994-95 (5th Cir, 1995), the magistrate judge below stayed all discovery pending the resolution of the defendants' qualified immunity claims. Meanwhile, Timmerman secured the deposition of Benedict in a related Louisiana state court proceeding, in which Benedict had not been granted qualified immunity. The district court however, refused to consider the Benedict deposition testimony in ruling on the motion for summary judgment. Timmerman now argues that the stay of discovery in the federal proceeding should not have precluded the district court from considering a deposition lawfully taken in a state court proceeding.

Whatever the merits of Timmerman's argument, we see no reason to pass on the issue. The proffered testimony of Benedict would have been irrelevant to the determination of the reasonableness of the defendants' actions, and hence any error committed by the district court in refusing to consider that testimony was harmless. To justify initiating a search of an employee's office under the "reasonableness under all circumstances" test, a government employer need only show that there are "reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct." *O'Connor*, 480 U.S. at 726, 107 S. Ct. at 1502. As the district court found, multiple factors lent credibility to Fork's tips, thus providing the requisite "reasonable grounds": (1) Fork was not an anonymous tipster but identified himself and provided his telephone number; (2) Fork

knew that Timmerman had designated the Hemlock Society as the beneficiary of his life insurance policy, and Fork knew the exact date that this designation had been made; (3) Fork knew that Timmerman had refused in the past to accept the recommendations of mental health professionals, a fact previously communicated to L.S.U. officials by Timmerman; (4) Fork knew that Timmerman was unhappy both with his department and with its chair, opinions which Timmerman had previously expressed to various defendants; and (5) Fork knew that Timmerman was suffering from stress, a fact Timmerman had also previously communicated to the defendants. The Benedict deposition testimony offered by Timmerman would only have demonstrated that the defendants failed to corroborate various other assertions made by Fork before acting in reliance on Fork's tip. Appellant's Br. at 18. Yet as the district court found, there existed ample indicia of Fork's reliability to justify the defendants' suspicions of work-related misconduct. The defendants need not have corroborated all of Fork's assertions to obtain the reasonable grounds necessary to conduct the search.

For the reasons set forth above, the district court's grant of summary judgment is in all respects AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

MARC TIMMERMAN

CIVIL ACTION NO. 96-34-B-M1

-vs-

JUDGE F. A. LITTLE, JR.

EDWARD McLAUGHLIN, et al.

RULING

For the reasons discussed below, the defendants' motion for summary judgment is GRANTED.

Background

Since 1995, Marc Timmerman has been an assistant professor at Louisiana State University ("LSU"). After Timmerman was hired, LSU officials had telephone conversations about Timmerman with a man named Fork, who said he was Timmerman's friend. Fork claimed that Timmerman had told him that he was planning to kill himself or fellow LSU employees. Following these conversations, LSU's Director of Human Resource Management, Forest Benedict, told Timmerman that the university wanted him to undergo evaluation, and that he was being placed on administrative leave. At Benedict's request, LSU employees, including campus police officers Ernie Sanchez and Andre Guerin, later searched Timmerman's office to look for a gun.

At the request of LSU officials, clinical psychologist Cary Rostow interviewed Timmerman that same month and had him take a battery of psychological tests. An agreement between Timmerman's counsel and LSU provided that the psychologist's evaluation of Timmerman would be limited to three areas: 1) whether Timmerman posed a danger to himself or others; 2) if he did pose such a danger, what treatment, therapy, or testing was recommended; and 3) the circumstances under which Timmerman might return to work. Rostow was instructed by Joan Thompson, LSU's Assistant Director of Human Resource Management, to provide in his report on Timmerman only the answers to these questions, without narrative explanation as to how he had arrived at his conclusions.

Rostow interviewed Timmerman at length during his first visit, and Timmerman underwent psychometric testing during a second visit. Rostow concluded that Timmerman was not a danger either to himself or to others, thus recommending no treatment concerning such a danger, and finding that Timmerman could return to work immediately if such a danger was the sole consideration in his doing so. Rostow afterward discussed Timmerman's testing with Benedict. Timmerman was allowed to return to work, although he did not return to teaching that semester.

Timmerman filed suit under 42 U.S.C. § 1983 against Rostow, Benedict, Thompson, Gutmark, Sanchez, and Guerin, as well as Edward McLaughlin, dean of LSU's College of Engineering, LSU chancellor William Davis, and LSU provost and vice-chancellor William Jenkins. The complaint alleges violation of Timmerman's Fourth and Fourteenth Amendment rights. Benedict, Thompson, Gutmark, Sanchez, Guerin, McLaughlin, Davis, and Jenkins bring this motion to dismiss pursuant to Rule 12(b)(6), or, in the alternative, for summary

judgment under Rule 56.

The defendants assert that Timmerman's complaint fails to state a claim upon which relief can be granted, and should be dismissed pursuant to Rule 12(b)(6). To be timely, a motion under Rule 12(b) must be made before a responsive pleading, Fed. R. Civ. P. 12(b), even though the defense of failure to state a claim upon which relief can be granted is not waived by a failure to raise it before or within a responsive pleading, Fed. R. Civ. P. 12(h)(2). Since the defendants have previously filed a responsive pleading, the court will treat the motion as one for summary judgment pursuant to Rule 56.

The Motion for Summary Judgment

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," when viewed in the light most favorable to the non-movant, "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.* at 248. In making its determination, the court must draw all justifiable inferences in favor of the nonmoving party. *Id.* at 255. Once the moving party has initially shown "that there is an absence of evidence to support the nonmoving party's case," *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986), the non-movant must come forward, after adequate time for discovery, with "specific facts" showing a genuine issue for trial. Fed. R. Civ. P. 56(e); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "Conclusory denials, improbable inferences, and legalistic argumentation" are not an adequate substitute for specific

facts showing that there is a genuine issue for trial. *S.E.C. v. Recile*, 10 F.3d 1093, 1097 (5th Cir. 1993).

Section 1983

Section 1983 provides a cause of action against "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen. . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws ...." To state a claim under § 1983 a plaintiff must allege a violation of a federally protected right, and must show that the alleged deprivation was committed by a person acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988 The Fourteenth Amendment, being directed at the states, can be violated only by conduct that can fairly be characterized as "state action." *Lugar v. Edmonston Oil Company, Inc.*, 457 U.S. 922, 924 (1982). If a defendant's conduct satisfies the Fourteenth Amendment's state action requirement, that conduct also constitutes action under color of state law. *West*, 487 U.S. at 49. There is no dispute that the actions of LSU employees Benedict, Thompson, McLaughlin, Gutmark, Sanchez, Guerin, Davis, and Jenkins constitute state action.

Timmerman's Due Process Claims

Timmerman claims he was deprived of due process in being placed on administrative leave and in being required, as a condition of his employment, to undergo psychological evaluation. Timmerman alleges that in his meeting with Benedict, he was placed on indefinite administrative leave, and ordered to undergo psychiatric evaluation on pain of immediate summary termination of his employment. The evidence shows that Timmerman was placed on leave with pay. Timmerman

asserts that the decision to take this action was made by Benedict, Thompson, Gutmark, and McLaughlin.

Timmerman has failed to plead the deprivation of either a liberty interest or a property interest as a result of his being placed on paid leave, and we thus need not consider the nature of the process involved in that action. The Due Process Clause provides protection only to the particular substantive rights of life, liberty, and property. Property interests "are created and their dimensions are defined by existing rules or understandings that stem from than independent source such as state law or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Whether Timmerman has a property interest in his job is determined by state law. *Wallace v. Shreve Memorial Library*, 97 F.3d 746, 748 (5th Cir. 1996). Louisiana law provides Timmerman, who has an employment contract, a property interest in his job. La. C.C. Art. 2749. Although the scope of Timmerman's property interest may include continuing receipt of his salary as well as continuing employment, *e.g, Ayio v. Parish of West Baton Rouge School Bd.*, 569 So. 2d 234, 236 (La. App. 1st Cir. 1990), Timmerman has not been deprived of either his job or his salary. Timmerman has no established property interest under Louisiana law in uninterrupted teaching and research during his employment at LSU. Being placed on administrative leave with pay thus does not amount to a deprivation of a constitutionally protected interest. His due process claim concerning his being placed on administrative leave is dismissed.

Timmerman has also failed to demonstrate a due process violation in his being required to submit to psychological evaluation as a condition of his employment. We note here that Timmerman suffered no procedural deficiencies in his being required to undergo evaluation; we discuss below his

claims of invasion of privacy and defamation based on the evaluation. Timmerman asserts in an affidavit that he acceded to the requirement that he undergo evaluation under threat of immediate summary termination.[1] Timmerman was, however, hardly deprived of notice or hearing before undergoing evaluation. Although Timmerman disputes the adequacy of LSU's basis for requiring him to submit to the evaluation, he was told of the basis for this decision, and indeed was represented by counsel in discussions with LSU officials concerning the evaluation. Timmerman chose to submit to evaluation, after securing the advice of counsel, rather than to refuse and to undergo the University disciplinary process. Timmerman's submission to the evaluation deprived him of no constitutionally protected interest. His due process claim based on the evaluation is dismissed.

---

[1]The evidence shows, however, that Benedict gave Timmerman a letter stating that Timmerman was being required to undergo evaluation in compliance with the policy governing LSU's Employee Assistance Program. That policy provides:

> An employee may be directed by designated University authority to participate in an evaluation by the Employee Assistance Program as a condition of the University disciplinary process or for exhibiting aberrant behavior in the workplace. Failure or refusal by an employee to complete the conditions of an administrative referral to the EAP will result in the implementation of normal disciplinary processes.

The LSU policy governing termination for cause provides:

> Before dismissal for cause, a faculty member shall be entitled to have the charges stated in writing and to have a written description of the evidence supporting such charges, with a list of witnesses and a brief summary of each witness' testimony, and to have a hearing, with counsel, before a special committee of the faculty appointed by the Chancellor . . . . If the Chancellor recommends dismissal for cause, the faculty member may request that the President hear an appeal.

Timmerman's Claims of Damage to his Reputation

Timmerman claims that his being required to undergo psychological evaluation stigmatized him by implying that he was unfit for his job, that his reputation was damaged by the "malicious acts" of some of the defendants, and that Gutmark and McLaughlin made false statements about him that "destroyed his personal and professional reputation." Section 1983 serves to redress deprivations of federally protected rights. Allegations of damage to reputation or the impairment of future employment prospects fail to state a claim of a denial of a constitutional right. *Texas v. Thompson*, 70 F.3d 390, 392 (5th Cir. 1995) (citing *Seigert v. Gilley*, 500 U.S. 226, 233-34 (1991)). A plaintiff has an actionable § 1983 claim, however, if he alleges damage to reputation as a result of defamatory statements made by a state actor, accompanied by an infringement of some other interest, the "stigma-plus-infringement" test. *Thompson*, 70 F.3d at 392. To meet the stigma part of this test, a plaintiff must show that the stigma was caused by concrete, false factual assertions. *Id.* The plaintiff must also show that the defendant asserted serious wrongdoing on the plaintiff's part. *Vander Zee v. Reno*, 73 F.3d 1365, 1369 (5th Cir. 1996).

Timmerman has offered no evidence of false factual assertions of wrongdoing on his part by any of the defendants. This court therefore need not consider whether Timmerman sustained any damage concomitant to any purported stigma, as there has been a complete failure of proof of an essential element of his claim. Timmerman's claim of damage to his reputation is dismissed.

Timmerman's Claim of an Unreasonable Search

Timmerman claims that the search of his office conducted

by Sanchez, Guerin, and Ruth Stevens, an LSU official from the Department of Human Resource Management, violated his constitutional rights. The three conducted this search at the direction of Benedict, and Stevens understood the reason for the search to the University officials' belief that Timmerman might have kept a gun in his office for the purpose of injuring himself or fellow LSU employees.

The Fourth Amendment prohibits only those searches that are "ureasonable in the particular circumstances in which they are performed." *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 175 (5th Cir. 1987), vacated in part on other grounds, 489 U.S. 656 (1989). As the Supreme Court has noted, "The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the intrusion, the manner in which it is conducted, the jurisdiction for initiating it, and the place in which it is conducted." *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

Searches by government in its role as an employer are held to a less stringent standard under the Fourth Amendment than those made in its role as sovereign. *United States v. Reyes*, 87 F.3d 676, 680 (5th Cir. 1996). A plurality of the Supreme Court has noted that "the privacy interests of government employees in their place of work . . . are far less than those found at home or in some other context." *O'Connor v. Ortega*, 480 U.S. 709, 725 (1987). That plurality rejected outright the standard of "probable cause" for searches conducted by government employers to investigate work-related employee misconduct, holding that such searches should instead be judged by the standard of "reasonableness under all the circumstances" *Id.*

The evidence shows that a man named Fork, who claimed to be a friend of Timmerman's, had a telephone conversation with Gutmark, and a later telephone conversation with other LSU officials, including Benedict. Fork told the LSU officials that Timmerman had recently told him that Timmerman was considering both suicide and the killing of his LSU co-workers, including his superiors. Fork said that he believed that Timmerman was likely to commit such acts, and claimed that Timmerman had pre-paid his funeral expenses. Fork said that he had instructed Timmerman in the use of handguns, and described in some detail the four guns that Timmerman allegedly owned. The purported details of Timmerman's life that Fork described to the University officials indicated that Timmerman was a troubled man with a troubled past and a history of mental problems.

The evidence, viewed in the light most favorable to Timmerman, shows that several factors lent Fork's statements credibility: Fork was not an anonymous caller, but one who identified himself to university officials and gave them his telephone number. Fork told University officials, including Benedict, that on 13 September 1995 Timmerman had named the Hemlock Society, a group that supports the choice of suicide in some circumstances, as the beneficiary on his life insurance. Timmerman named the Hemlock Society as beneficiary of his retirement plan, in a document executed on 13 September 1995. Fork also told them that Timmerman had refused to accept the recommendations of mental health professionals in the past, because Timmerman felt they were not his mental equals. Timmerman told Benedict that he had seen mental health professionals in the past, that psychometric testing was an inappropriate method for evaluating someone like Timmerman, "a disabled Hispanic-American . . . with a Ph.D."; and that he was capable of compromising such test results. In a conversation with Gutmark, Fork said that Tim-

merman told him that the was concerned about getting tenure at LSU, an issue that Timmerman had earlier discussed with Benedict and with McLaughlin. Fork also said that Timmerman didn't like his department at LSU, and disliked Gutmark. Timmerman had complained to LSU officials about inadequate work facilities, about allegedly derogatory remarks made by his colleagues, and about his belief that Gutmark was discriminating against him. Fork also told Gutmark that Timmerman was suffering from stress; Timmerman himself indicated to LSU officials that he had stress-related problems. Timmerman indicates in his pleadings that he has refused to give the University his home phone number and address.

In light of the allegations made by Fork, and the circumstances lending support to Fork's credibility, it was reasonable for Benedict to initiate a weapons search of Timmerman's office. Fork credibly indicated that Timmerman may well have planned to kill himself or his fellow employees. Timmerman might easily have kept a weapon to carry out such a plan in his office. Based on information indicating that Timmerman planned to kill someone at the University, Stevens, Guerin, and Sanchez searched only Timmerman's LSU office, looking only in places that might have concealed a gun. The limited scope of this workplace intrusion and the important interest in maintaining workplace safety serve to place the search well outside the scope of the Fourth Amendment's proscription against unreasonable searches. Timmerman's claim of a constitutional violation based on the search of his office is dismissed.

Timmerman's Claim of Invasion of Privacy

The Supreme Court has recognized that the constitutional right of privacy includes the right of freedom in one's personal affairs from government surveillance and intrusion as well as the individual's interest in avoiding disclosure of per-

sonal matters. *Whalen v. Roe*, 429 U.S. 589, 598-99 & n.24 (1977). The Fifth Circuit has articulated the liberty interest in privacy as including the right to be free from disclosing personal matters to the government, including "the right to be free from the government disclosing private facts about its citizens and from the government inquiring into matters in which it does not have a legitimate and proper concern." *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985).

The Fifth Circuit has adopted a "balancing" approach to assessing claims of breaches of "confidentiality," whether they be allegations of intrusive questioning or disclosure of personal matters to the public. In determining whether an individual's constitutional right of privacy has been violated, we must balance any legitimate state interest against the individual interest in privacy. *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490, 492 (5th Cir. 1985), *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981).

The state has a legitimate interest in maintaining the safety of the faculty and students at LSU. Faced with the possibility that an employee may well pose a danger to the workplace community, the state's interest in maintaining safety outweighs that employee's interest in privacy to the extent intrusion is necessary to determine if a danger exists. LSU officials has a reasonable basis to believe that Timmerman might be dangerous to himself or to others at LSU, and thus had a reasonable basis for requiring Timmerman to submit to an evaluation to determine if, indeed, he was dangerous. The defendants did not violate Timmerman's right to privacy by requiring him to undergo psychological evaluation in these circumstances.

Neither did LSU officials violate Timmerman's right to privacy by discussing with Rostow the basis of his findings about Timmerman. The evidence shows that Timmerman told Benedict that he thought psychometric testing was an inap-

propriate method of evaluating him, and that he told Benedict that he was capable of compromising the test results. Benedict asked Rostow if Timmerman could have compromised his test results. Despite the agreement to limit the results of Rostow's evaluation to answers to three particular questions, the state has a legitimate interest in determining that the methodology used in evaluating an employee in keeping the explanation of the basis of the evaluation from state officials. Discussing with a psychologist the methodology used to evaluate a state employee's potential danger is not a violation of that employee's constitutional right of privacy. Timmerman's claim of invasion of privacy is dismissed.

In his memorandum in opposition to the defendant's motion, Timmerman states that he "expressly invokes Rule 56(f)," asserting that he should be permitted discovery related to a meeting between Rostow, Benedict, and Thompson concerning Rostow's evaluation. Timmerman's second amended complaint alleges that Rostow, Benedict, and Thompson "discuss[ed] the basis for Rostow's findings." As discussed above, such a discussion is not a violation of Timmerman's right of privacy. We will not allow discovery.

Timmerman also claims that Rostow, Benedict, and Thompson conspired to obtain his consent to a more extensive examination than that to which he had previously agreed. We need not examine the evidence in support of Timmerman's conspiracy allegations because Timmerman has not alleged any facts relevant to a conspiracy to violate his constitutional or statutory rights.

Timmerman's Claims against Davis and Jenkins

Timmerman asserts that Davis and Jenkins deprived him of his constitutional rights by virtue of their failure to super-

vise adequately the other defendants. These allegations fail to state a claim under § 1983. It is well established that supervisory officials cannot be held vicariously liable for their subordinates' constitutional conduct. *Mouille v. City of Live Oak*, 977 F.2d 924, 929 (5th Cir 1992). Supervisory officials may be held liable under § 1983 for violations of constitutional rights only if they either affirmatively participate in acts that cause a constitutional deprivation, or implement unconstitutional policies that causally result in the plaintiff's injury. *Id*. Timmerman makes no allegations that either Davis or Jenkins affirmatively participated in any of the conduct he alleges violated his constitutional rights. Neither does he allege that either of the two implemented any unconstitutional policy causing his injury. There is likewise no evidence supporting such claims. Timmerman's claims against Davis and Jenkins are dismissed.

For the reasons stated above, the defendant's motion for summary judgment is GRANTED.

Alexandria, Louisiana

3 February 1997

/s/F. A. LITTLE, JR., CHIEF JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

MARC TIMMERMAN

CIVIL ACTION NO. 96-34-B-M1

-vs-

JUDGE F. A. LITTLE, JR.

EDWARD McLAUGHLIN, et al.

JUDGMENT

For written reasons given this date, the defendants' motion for summary judgment is GRANTED. This suit is dismissed.

Alexandria, Louisiana

3 February 1997

/s/F. A. LITTLE, JR., CHIEF JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

MARC TIMMERMAN

CIVIL ACTION NO. 96-34-B-M1

VERSUS

JUDGE LITTLE

EDWARD MCLAUGHLIN, ET AL.

MAGISTRATE JUDGE RIEDLINGER

JUDGMENT

CONSIDERING THE FOREGOING Unopposed Motion to Alter or Amend Judgment; Alternatively, Motion to Correct Judgment, filed by plaintiff,

IT IS ORDERED THAT the Judgment previously signed herein on February 3, 1997, be and it is hereby corrected, altered or amended to read as follows:

For written reasons given on February 3, 1997, the defendants' motion for summary judgment is GRANTED. The defendants Edward McLaughlin, Joan Thompson, Forest Benedict, Ephraim Gutmark, Ernie Sanchez, Andre Guerin, William Davis, and William Jenkins are dismissed from this litigation.

THUS DONE AND SIGNED, this 17 day of February, 1997, in Alexandria, Louisiana.

/s/F. A. LITTLE, JR., CHIEF JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

MARC TIMMERMAN

CIVIL ACTION NO. 96-34-B-M1

VERSUS

JUDGE F.A. LITTLE, JR.

EDWARD MCLAUGHLIN, ET AL.

JUDGMENT

CONSIDERING THE FOREGOING Unopposed Motion for Entry of Final Judgment Under Fed.R.Civ.P. 54(b), filed by plaintiff,

IT IS ORDERED, ADJUDGED AND DECREED, that final judgment in accordance with Fed.R.Civ.P. 54(b) be entered herein as to fewer than all of the claims and parties, dismissing Edward McLaughlin, Joan Thompson, Forest Benedict, Ephraim Gutmark, Ernie Sanchez, Andre Guerin, William Davis, and William Jenkins from this litigation, upon this Court's express determination that there is no just reason for delay and express direction for entry of final judgment.

THUS DONE AND SIGNED, this 7 day of March, 1997, in Alexandria, Louisiana.

/s/F. A. LITTLE, JR., CHIEF JUDGE
UNITED STATES DISTRICT COURT

(2)

Supreme Court, U.S.
FILED
DEC 23 1997
CLERK

DOCKET NUMBER 97-903

Supreme Court of the United States
October Term, 1997

MARC TIMMERMAN
Petitioner

VERSUS

EDWARD MCLAUGHLIN, JOAN THOMPSON,
FOREST BENEDICT, EPHRAIM GUTMARK,
ERNIE SANCHEZ, ANDRE GUERIN,
CARL ROSTOW, WILLIAM DAVIS, WILLIAM JENKINS
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Louisiana State University ("L.S.U.") hired Timmerman effective August 21, 1995, as an Assistant Professor of Mechanical Engineering.

Shortly after his arrival on the L.S.U. campus, on September 21, 1995, Timmerman met with defendant Forest Benedict, Director of the L.S.U.'s Department of Human Resource Management, and expressed his unhappiness with his situation at L.S.U. Timmerman expressed concern that L.S.U. might never grant him tenure. Timmerman also said he was concerned his reliance on public transportation due to stress-related problems was denying him consulting opportunities and causing him logistical problems. Finally, Timmerman told Benedict he wanted to leave L.S.U. but would stay the one year necessary to apply for benefits with the University's disability insurance

carrier. Two days later, Timmerman expressed the same concerns to defendant Edward McLaughlin, Dean of L.S.U.'s College of Engineering.

On September 27, 1995, a man who identified himself as Carl Fork (hereinafter "Fork"), telephoned the office of defendant Ephraim Gutmark, head of L.S.U.'s Department of Mechanical Engineering. Gutmark was unavailable but returned the call the next day. The man, who again identified himself as Carl Fork, told Gutmark that he was a close personal friend of Timmerman. Fork next told Gutmark that Timmerman was very unhappy at L.S.U. and was considering killing himself and/or colleagues. Fork said he knew Timmerman was capable of such action because he (Fork) had once trained Timmerman in the use of handguns. Fork also told Gutmark that Timmerman had recently prepared a will, pre-paid his funeral

expenses, and purchased two new handguns.

After the conversation was over, Gutmark telephoned McLaughlin and related the substance of his conversation with Fork. That same day, defendants McLaughlin, Benedict, and Joan Thompson, Assistant Director of Human Resource Management, placed a telephone conference call to Fork. Also present in McLaughlin's office was an officer with the L.S.U. campus police. Fork was advised the conversation was being monitored via speaker phone. Fork then reiterated that he was a friend of Timmerman's, that he had once trained Timmerman in the use of handguns, that Timmerman had recently purchased several handguns, and that, in recent conversations, Timmerman had discussed possibly killing himself and/or his colleagues and superiors at L.S.U. Fork told the listeners Timmerman had a history of mental problems but refused

the recommendations of psychologists because he felt they were not his mental equals. Fork also told the listeners Timmerman had applied for life insurance on September 13, 1995, and named the Hemlock Society, described as a pro-suicide organization, as the beneficiary. A search of University records revealed that on the exact date identified by Fork, Timmerman had named the Hemlock Society as beneficiary of his TIAA-CREF retirement benefits.

On October 2, 1995, Benedict met with Timmerman and told him he was being placed on paid administrative leave pending a psychological evaluation. Timmerman responded that he had seen other mental health professionals in the past and that he believed he was capable of compromising the test due to his high I.Q. Timmerman requested and was granted additional time prior to the evaluation to obtain counsel.

On October 4, 1995, Benedict instructed Ruth Stevens, Administrative Analyst with the Department of Human Resource Management, to search Timmerman's office for a gun. Stevens proceeded to Timmerman's office accompanied by Gutmark and by defendants Ernie Sanchez and Andre Guerin of the L.S.U. campus police. Gutmark unlocked the door, then waited outside while Stevens, Sanchez, and Guerin searched the office. They confined their search to areas large enough to hold a gun. No gun was located and nothing was removed from the office.

Timmerman filed this suit in the United States District Court for the Middle District of Louisiana on January 12, 1996. He asserts claims under 42 U.S.C. § 1983 for violations of his rights under the Fourth and Fourteenth Amendments, and under the Americans With Disabilities Act of 1990 (the "ADA"), 42 U.S.C. § 12101 *et seq.*

On February 3, 1997, the trial court granted summary judgment in favor of the individual defendants. Pertinent to the present petition, the trial court ruled that the search of Timmerman's office was reasonable, and that his Fourth Amendment claim therefore failed. The United States Court of Appeals for the Fifth Circuit affirmed.

SUMMARY OF ARGUMENT

The lower courts applied the proper standard in finding that defendants' search of Timmerman's office was reasonable. The lower courts ruled that the "reasonable under all the circumstances" standard, rather than the "probable cause" standard, governs the search of the plaintiff's office. The reasonableness standard is the appropriate standard because the search was for work-related misconduct. The presence of campus police officers does not require

that a different standard be applied. Applying the reasonableness test, the lower courts correctly found that defendants reasonably relied on the detailed and corroborated statements of Carl Fork.

ARGUMENT

The lower courts properly analyzed the search of Timmerman's office under the "reasonableness under all the circumstances" test of O'Connor v. Ortega, 480 U.S. 709, 107 S. Ct. 1492, 94 L. Ed. 2d 714 (1987), rather than the probable cause test.

A. The Search Was An Investigation Of Work-Related Misconduct

Contrary to Timmerman's assertions, L.S.U. officials authorized and conducted the office search to investigate possible work-related misconduct. Harming or killing one's co-workers constitutes the most serious kind of work-related misconduct. Louisiana law requires employers to provide employees with a safe work environment.

See, e.g., Mundy v. Department of Health & Human Resources, 620 So. 2d 811 (La. 1993); Williams v. Homco International, Inc., 402 So. 2d 182 (La. App. 1st Cir. 1981). Although the duty does not always extend to protecting employees from the willful conduct of co-employees, *see, e.g.*, Barto v. Franchise Enterprises, Inc., 588 So. 2d 1353 (La. App. 2d Cir. 1991), *writ denied*, 591 So. 2d 708 (1992), the employer may be liable for the willful conduct of co-employees if the employer has been warned or put on notice of the potential for harm, as was L.S.U. *See, e.g.*, Griffin v. Wolf's, Inc., 61 So. 2d 523 (La. App. 2d Cir. 1952). Because society charges an employer with the extraordinary duty of protecting employees from co-employees and third persons, the employer's reasonable efforts to satisfy that obligation must be considered work-related. This is especially so in the

context of a large state university, which has thousands of employees and is attended by tens of thousands of students.

At the time L.S.U. officials decided to search his office, Timmerman was not suspected of any criminal activity, and the search was motivated solely by a desire to satisfy L.S.U.'s obligation to provide a safe work environment. However, even if, as Timmerman contends, the search was conducted for reasons not wholly unrelated to criminal conduct, respondents respectfully suggest the *O'Connor* test still applies. At least one United States Court of Appeals has applied *O'Connor* to the search of an office for reasons almost *entirely related* to illegal conduct. In United States v. Johnson, 16 F.3d 69 (5th Cir. 1994), the defendant, a loan officer in a municipal economic development agency, was arrested for making illegal loans while employed at

an earlier job. Upon learning of his arrest, his current employer searched his office for documents related to possible illegal loans made while employed at his present job. Applying *O'Connor*, the Fifth Circuit upheld the search.

B. The Presence Of Campus Police Does Not Render O'Connor Inapplicable

The *O'Connor* reasonableness standard applies regardless of whether campus police were involved in the search. Notwithstanding Timmerman's argument to the contrary, it is the purpose of the search rather than the presence of campus police that makes *O'Connor* applicable. The defendant campus police officers did not participate in the search of Timmerman's office for purposes of gathering evidence; indeed, Timmerman was never suspected of any criminal wrongdoing. Rather, the search was initiated by officials in the Department of Human Resources solely for the purpose of

safeguarding lives and providing a safe work environment to both employees and students.

Department of Human Resources officials asked the campus policemen to participate in the search because they were searching for firearms: *dangerous weapons*. They did not know whether they might find firearms; they did not know what type of firearms they might find; they did not know whether the firearms might be loaded; they did not know whether the firearms might have been modified or tampered with. Motivated by their obligation to ensure a safe work environment, Department of Human Resources officials were in the uncomfortable position of searching for something that could cause serious harm to themselves or others. It was therefore entirely reasonable to bring along campus police officers, who are trained in the safe handling of guns.

C. The Search Was Reasonable Under All The Circumstances

In Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), the Supreme Court of the United States developed a totality of the circumstances test by which to analyze an informant's tip: in considering a tip, a court should consider, among other items, the informant's veracity, reliability, and basis of knowledge, and a deficiency in one may be compensated for by a strong showing of some other indicia of reliability. *Gates*, 462 U.S. at 233, 103 S. Ct. 2339.

The trial court listed five specific reasons why defendants reasonably relied on Fork's statements: (1) Fork was not an anonymous caller, but identified himself to University officials and provided them with his phone number, (2) Fork knew not only that Timmerman had named the Hemlock Society as his insurance beneficiary, but also knew

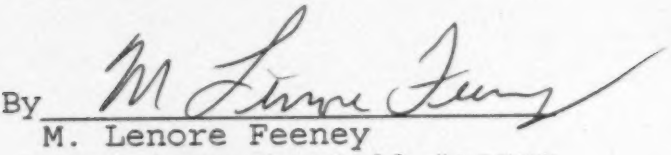
the exact date on which Timmerman made this designation, (3) Fork told Benedict that Timmerman had refused to accept the recommendations of mental health professionals in the past, a fact Timmerman had himself previously communicated to Benedict, (4) Fork told Gutmark that Timmerman was unhappy with his department and with Gutmark, facts Timmerman had himself previously communicated to other L.S.U. officials, and (5) Fork told Gutmark Timmerman was suffering from stress, a fact Timmerman had himself previously communicated to other L.S.U. officials. Thus, the search was reasonable at its inception. The search also was reasonable in scope. Defendants allege, Timmerman does not dispute, and the trial court specifically found that the search was limited to areas inside Timmerman's office that were large enough to contain a gun.

CONCLUSION

The appropriate standard by which to analyze the search of Timmerman's office is the reasonableness under all the circumstances test. The search was for work-related misconduct, and the presence of campus police officers does not require that a different standard be applied. Applying that test, the trial court correctly found defendants acted reasonably in searching Timmerman's office based on the detailed and corroborated statements of Carl Fork, an identified citizen. Defendants respectfully request that this Honorable Court deny Timmerman's petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

By Attorneys,

TAYLOR, PORTER, BROOKS
& PHILLIPS, L.L.P.

By 

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